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Fall 2012

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### Recommended Citation

Kathryn L. Moore, *Social Security in an Era of Retrenchment: What Would Happen if the Social Security Trust Funds were Exhausted?*, 28 A.B.A. J. Lab. & Emp. L. 43 (2012).

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## **Social Security in an Era of Retrenchment: What Would Happen if the Social Security Trust Funds were Exhausted?**

### **Notes/Citation Information**

ABA Journal of Labor & Employment Law, Vol. 28, No. 1 (Fall 2012), pp. 43-57

# Social Security in an Era of Retrenchment: What Would Happen if the Social Security Trust Funds Were Exhausted?

Kathryn L. Moore\*

Social Security's income, including interest income on the Social Security trust funds' reserves, currently exceeds costs.<sup>1</sup> The system, however, is facing a long-term deficit. Specifically, the Social Security Trustees project that, unless the Social Security Act is amended, by 2033 the system's reserves will be depleted,<sup>2</sup> and its income will only be sufficient to cover about 75 percent of scheduled benefits.<sup>3</sup>

This article addresses two questions related to the funding of Social Security. Part I discusses what would happen if the Social Security trust funds were exhausted. Part II discusses whether Congress could amend the Social Security Act to reduce retroactively scheduled but unpaid Social Security benefits.

## I. What Would Happen if Social Security's Trust Funds were Exhausted?

This section begins by describing the Social Security trust funds and the sources of their appropriations. It then addresses the conflict between the Social Security Act, which does not tie entitlement to Social Security benefits to the availability of assets in the Social Security trust funds, and the Antideficiency Act, which prohibits the Treasury Department from issuing Social Security checks for benefits that exceed appropriated funds.

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1. Bd. of Trs., Fed. Old-Age & Survivors Ins. & Fed. Disability Ins. Trust Funds, THE 2012 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, H.R. Doc. No. 112-102, at 2 (2012) [hereinafter 2012 ANNUAL REPORT], available at <http://www.ssa.gov/oact/tr/2012/tr2012.pdf>.

2. *Id.* at 3.

3. *Id.* at 11.



### A. Trust Funds and the Sources of Their Appropriations

Section 201 of the Social Security Act creates two separate trust funds: the "Federal Old-Age and Survivors Insurance Trust Fund" (OASI trust fund)<sup>4</sup> and the "Federal Disability Insurance Trust Fund" (DI trust fund).<sup>5</sup> Together, they are referred to as the OASDI or Social Security trust funds.<sup>6</sup> The term "trust fund," for purposes of the federal budget, differs significantly from the term as used in the private sector.<sup>7</sup> For purposes of the federal budget, "trust fund refers to a type of account, designated by law as a trust fund, for receipts or offsetting receipts dedicated to specific purposes and the expenditure of those receipts."<sup>8</sup>

The Social Security trust funds are financed principally through permanent earmarks.<sup>9</sup> Specifically, Social Security Act sections 201(a)(3)–(4) and 201(b)<sup>10</sup> appropriate to the Social Security trust funds an amount equal to 100 percent of the Federal Insurance and Contributions Act<sup>11</sup> (FICA) imposed on employees<sup>12</sup> and employers,<sup>13</sup> and an amount equal to 100 percent of the taxes imposed on the self-employed under chapter 2 of the Internal Revenue Code.<sup>14</sup> In 2011, these appropriations accounted for 70 percent of the trust funds' total income.<sup>15</sup>

4. 42 U.S.C. § 401(a) (2006).

5. *Id.* § 401(b).

6. *Cf.* PAUL N. VAN DE WATER, CTR. ON BUDGET & POLICY PRIORITIES, UNDERSTANDING THE SOCIAL SECURITY TRUST FUNDS 1 (2010) ("Although legally distinct, they are often referred to collectively as 'the Social Security trust fund.'"), available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=3299>.

7. *See* OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2012, at 136 (2012) [hereinafter OMB ANALYTICAL PERSPECTIVES], available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/spec.pdf>; OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2012 tbl.4 (2012), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/hist.pdf>.

8. OMB ANALYTICAL PERSPECTIVES, *supra* note 7, at 136.

9. WILLIAM C. FAY & MICHELLE D. RODGERS, HARVARD LAW SCH. FED. BUDGET POLICY SEMINAR, BRIEFING PAPER NO. 17, APPROPRIATIONS FOR MANDATORY EXPENDITURES § III.A (2008) ("The OASDI Trust Funds are financed almost entirely through permanent appropriations from an earmarked revenue source."). Technically, Federal Insurance Contributions Act (FICA) and self-employment taxes are paid directly to the General Fund and then transferred from the General Fund to the Social Security trust funds pursuant to 42 U.S.C. §§ 401 and 402. *Id.* § II.iii.b n.14.

10. 42 U.S.C. § 401(a)(3)–(4), (b) (2006).

11. 26 U.S.C. ch. 21.

12. 26 U.S.C. § 3101 (2006).

13. *Id.* § 3111.

14. *Id.* § 1401.

15. 2012 ANNUAL REPORT, *supra* note 1, at 6. Prior to the enactment of the temporary payroll tax holiday—Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 601, 124 Stat. 3296, 3309—appropriations for FICA and self-employment taxes represented a much larger percentage of Social Security's total revenue. For example, in 2010, FICA and self-employment taxes accounted for 82 percent of the trust funds' total income. *See* Bd. of Trs., FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TRUST FUNDS, THE 2011 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST



Section 201(d) of the Social Security Act requires that the assets of the Social Security trust funds be invested in U.S. government bonds.<sup>16</sup> Section 201(f) of the Social Security Act requires that the interest on, and proceeds from the sale or redemption of, any obligations held by the trust funds be credited to and form a part of the trust funds.<sup>17</sup> In 2011, interest on the trust funds' investments accounted for 14 percent of the trust funds' total income.<sup>18</sup>

Section 86 of the Internal Revenue Code imposes an income tax on certain Social Security benefits.<sup>19</sup> In essence, single taxpayers with "combined income"<sup>20</sup> that exceeds \$25,000 and married taxpayers with combined income that exceed \$32,000 must pay income tax on 50 percent of their Social Security benefits.<sup>21</sup> The revenue from this tax, which is appropriated to the OASDI trust funds,<sup>22</sup> accounted for 3 percent of the trust funds' total income in 2011.<sup>23</sup>

Prior to 2011, less than 1 percent of the Social Security trust funds' total income came from reimbursements from the General Fund.<sup>24</sup> In 2011, reimbursements from the General Fund increased to 13 percent of the Social Security trust funds' total income<sup>25</sup> as a result of the reduction in self-employed and employee FICA taxes under the temporary "payroll tax holiday" enacted for 2011,<sup>26</sup> and extended through 2012.<sup>27</sup>

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FUNDS, H.R. DOC. NO. 112-23, at 5 (2011) [hereinafter 2011 ANNUAL REPORT], available at <http://www.ssa.gov/oact/tr/2011/tr2011.pdf>.

16. 42 U.S.C. § 401(d) (2006).

17. *Id.* § 401(f).

18. 2012 ANNUAL REPORT, *supra* note 1, at 6.

19. 26 U.S.C. § 86 (2006).

20. For these purposes, "combined income" means the taxpayer's adjusted gross income plus half of the taxpayer's Social Security benefits plus any tax-exempt interest income. See ALICIA H. MUNNEL & DAN MULDOON, CTR. FOR RET. RESEARCH AT BOSTON COLLEGE, THE IMPACT OF INFLATION ON SOCIAL SECURITY BENEFITS 6 n.9 (2008), available at <http://crr.bc.edu/briefs/the-impact-of-inflation-on-social-security-benefits/>.

21. In 1993, Congress amended IRC § 86 to impose tax on 85 percent of Social Security benefits for single taxpayers with combined income that exceeds \$34,000 and for married taxpayers with combined income that exceeds \$44,000. The revenue generated from the new tax is appropriated to the Hospital Insurance (Medicare) trust fund. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312.

22. Social Security Amendments Act of 1983, Pub. L. No. 98-21, § 121(e), 97 Stat. 83 (appropriating to the OASI and DI trust funds revenues generated from IRC § 86 as originally enacted at a rate of 50 percent).

23. See 2012 ANNUAL REPORT, *supra* note 1, at 6.

24. See, e.g., 2011 ANNUAL REPORT, *supra* note 15, at 5-6. In 2011, the primary General Fund reimbursement was for a temporary reduction in the employer FICA tax for hiring certain unemployed workers under the Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 101, 124 Stat. 71, 72 (2011). *Id.* at 22; see SOC. SEC. ADMIN., FISCAL YEAR 2012 BUDGET JUSTIFICATION (2011) (detailed discussion of all of the appropriations made in 2010 and estimated in 2011 and 2012), available at <http://www.ssa.gov/budget/2012PTF.pdf>.

25. 2012 ANNUAL REPORT, *supra* note 1, at 6.

26. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 601, 124 Stat. 3309, 3296.

27. See Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. No. 112-78, § 101, 125 Stat. 1280, 1281 (extending payroll tax holiday through Feb. 29, 2012); Middle



*B. Conflict Between the Social Security Act and the Antideficiency Act*

Section 201(h) of the Social Security Act<sup>28</sup> requires that Social Security benefits be paid from the Social Security trust funds.<sup>29</sup> Yet the Social Security Act does not link beneficiaries' entitlement to the availability of assets in the trust funds. Rather, sections 202<sup>30</sup> and 223<sup>31</sup> of the Social Security Act simply provide that individuals who satisfy the Social Security Act's eligibility requirements are "entitled" to Social Security benefits. Thus, Social Security is an "entitlement program"<sup>32</sup> pursuant to which the federal government is legally obligated to pay benefits to beneficiaries who satisfy the statutory requirements regardless of the availability of funds.<sup>33</sup>

Article I of the U.S. Constitution, however, provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>34</sup> The Appropriations Clause is implemented by the Antideficiency Act,<sup>35</sup> which prohibits any officer or employee of the federal government from making or authorizing any expenditure or obligation that exceeds the amount available through

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Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 1001, 126 Stat. 156, 158 (extending payroll tax holiday through calendar year 2012); see also SOC. SEC. ADMIN., *supra* note 24, at 13 (estimating appropriations of \$79.368 billion in 2011 and \$30.555 billion for payroll tax holiday through Feb. 29, 2012).

28. 42 U.S.C. § 401(h) (2006).

29. Specifically, 42 U.S.C. § 401(h) requires that Social Security disability benefits be paid from the Social Security DI trust fund and all other Social Security benefits be paid from the OASI trust fund. As noted above, however, this article will refer to the two trust funds together.

30. 42 U.S.C. § 402 (2006) (old age provisions).

31. *Id.* § 423 (disability provisions).

32. See KATHLEEN S. SWENDIMAN & THOMAS J. NICOLA, CONG. RESEARCH SERV., RL 32822, SOCIAL SECURITY REFORM: LEGAL ANALYSIS OF SOCIAL SECURITY BENEFIT ENTITLEMENT ISSUES 9 (2010) (citing sections 202 and 223 of the Social Security Act in support of the statement that "Social Security is a statutory entitlement program."); see also OMB ANALYTICAL PERSPECTIVES, *supra* note 7, at 134 ("Entitlement refers to a program in which the Federal Government is legally obligated to make payments or provide aid to any person who, or State or local government that, meets the legal criteria for eligibility. Examples include Social Security, Medicare, Medicaid, and Food Stamps.").

33. See 2 U.S.C. § 622(9) (2006) (defining "entitlement authority" as "the authority to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriations Acts, to any person or government if, under the provisions of the law containing that authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by that law.").

34. U.S. CONST. art. I, § 9, cl. 7.

35. 31 U.S.C. § 1341(a)(1)(A); see Paul E. Salamanca, *The Constitutionality of an Executive Spending Plan*, 92 Ky. L. J. 149, 181-85 (2003) (the Appropriations Clause is substantially implemented by the Antideficiency Act); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-34 to 6-36 (2006) (summary of the history of the Antideficiency Act), available at <http://www.gao.gov/assets/210/202819.pdf>.



an appropriation or fund.<sup>36</sup> Violations of the Antideficiency Act are punishable by administrative and criminal penalties, including suspension from duty without pay or removal from office,<sup>37</sup> fines of up to \$5,000, and/or imprisonment for up to two years.<sup>38</sup>

Thus, under the Antideficiency Act, the Social Security trust funds' balance determines whether the Treasury Department has the legal authority to issue Social Security checks,<sup>39</sup> yet the Social Security Act provides that individuals who satisfy the Act's eligibility requirements are legally entitled to benefits regardless of whether there are sufficient assets in the trust funds to pay for those benefits.<sup>40</sup> The Social Security Act does not address the question of what would happen if the Social Security trust funds were exhausted.<sup>41</sup>

### C. Reports Suggest Exhaustion of Funds Would Mean Reduced Benefits

Past experience does not provide definitive guidance on what would happen if the Social Security trust funds were exhausted because neither the OASI<sup>42</sup> trust fund nor the DI<sup>43</sup> trust fund has ever

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36. See 31 U.S.C. § 1341(a)(1)(A). According to the GAO:

In simple terms, once an appropriation is exhausted, the making of any further payments, apart from using expired balances to liquidate or make adjustments to valid obligations recorded against that appropriation violates 31 U.S.C. § 1341. When the appropriation is fully expended, no further payments may be made in any case. If an agency finds itself in this position, unless it has transfer authority or other clear statutory basis for making further payments, it has little choice but to seek a deficiency or supplemental appropriation from Congress, and to adjust or curtail operations as may be necessary.

U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 35, at 6-41 to 6-42.

37. 31 U.S.C. § 1349 (2006).

38. *Id.* § 1350.

39. U.S. GEN. ACCOUNTING OFFICE, GAO-01-199SP, FEDERAL TRUST AND OTHER EAR-MARKED FUNDS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 15 (2001) (citing Antideficiency Act in support of statement that "the fund balance determines whether Treasury has the legal authority to issue checks for a program."), available at <http://www.gao.gov/assets/210/200562.pdf>.

40. According to the GAO, even under an entitlement program, an agency could presumably meet a funding shortfall by such measures as making prorated payments, but such actions would be only temporary pending receipt of sufficient funds to honor the underlying obligation. The recipient would remain legally entitled to the balance. See U.S. GEN. ACCOUNTING OFFICE, GAO-04-261SP, PRINCIPLES OF APPROPRIATIONS LAW 3-49 n.40 (2004), available at <http://www.gao.gov/assets/210/202437.pdf>.

41. CHRISTINE SCOTT, CONG. RESEARCH SERV., RL33514, SOCIAL SECURITY: WHAT WOULD HAPPEN IF THE TRUST FUNDS RAN OUT? 6 (2011), available at <http://aging.senate.gov/crs/ss1.pdf> ("The Social Security Act does not stipulate what would happen to benefits if the trust funds ran out.")

42. The OASI trust fund was established in 1939. Pub. L. No. 76-379, § 201, 53 Stat. 1360, 1362 (1939).

43. The DI trust fund was created in 1956 with the passage of Pub. L. No. 84-880, 70 Stat. 807 (1956), and became effective in 1957.



been exhausted.<sup>44</sup> The trust funds have, however, approached exhaustion in the past.<sup>45</sup> Most significantly, the Social Security Trustees projected in their 1982 Report that the OASI trust fund would be exhausted by July 1983 if the Social Security Act was not amended.<sup>46</sup> Congress addressed this issue in the short term by permitting the OASI trust fund to borrow from the Disability Income (DI) and Hospital Insurance (Medicare) trust funds.<sup>47</sup> It addressed the problem in the long term by enacting the Social Security Amendments of 1983,<sup>48</sup> which, among other things, accelerated scheduled increases in the Social Security tax rates and introduced a delayed, gradual increase in the age at which beneficiaries are entitled to full Social Security benefits.<sup>49</sup>

The National Commission on Social Security Reform, which was established in 1981 to review the financial condition of the Social Security trust funds and offer recommendations on how their financial condition might be improved,<sup>50</sup> issued a report recommending, among other things, that the Social Security Act provide for a fail-safe mechanism "so that benefits could continue to be paid on time despite unexpectedly adverse conditions which occur with little advance notice."<sup>51</sup> The Commission considered three different mechanisms: (1) borrowing from the General Fund of the Treasury for a limited period of time; (2) temporarily reducing payable benefits; and (3) temporarily increasing the Social Security tax rates and/or the maximum taxable earnings base. The members of the Commission, however, strongly disagreed as to the type of mechanism, or combination of mechanisms, that should

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44. See SCOTT, *supra* note 41, at 3 ("Neither of the Social Security trust funds has ever become insolvent.").

45. Stephen C. Goss, *The Future Financial Status of the Social Security Program*, 70 SOC. SEC. BULL. 111, 113 (2010) ("For years 1973 through 1983, the combined OASI and DI Trust Funds were operating with a negative cash flow that was depleting the trust fund reserves toward exhaustion."); see also SCOTT, *supra* note 41, at 4 ("[I]n the early 1980s, a solvency crisis loomed for the OASI trust fund.").

46. BD. OF TRS., FED. OLD-AGE & SURVIVORS INS. & FED. DISABILITY INS. TRUST FUNDS, THE 1982 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, H.R. DOC. NO. 97-163, at 3 (1982), available at <http://www.ssa.gov/history/reports/trust/1982/1982.pdf>.

47. Act of Dec. 29, 1981, Pub. L. No. 97-123, § 1, 95 Stat. 1659, 1659. In November and December of 1982, the OASI trust fund borrowed about \$5.1 billion from the DI trust fund and \$12.4 billion from the Hospital Insurance (Medicare) trust fund. The OASI trust fund repaid the \$17.5 billion it borrowed by 1996. See SCOTT, *supra* note 41, at 4 n.17.

48. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65.

49. See John A. Svahn & Mary Ross, *Social Security Amendments of 1983: Legislative History and Summary of Provisions*, SOC. SEC. BULL., July 1983, at 3-4 (overview of the changes wrought by the 1983 Amendments).

50. Exec. Order No. 12,335, 3 C.F.R. § 217 (1981), reprinted in 42 U.S.C. § 401 (2006).

51. *Report of the National Commission on Social Security Reform*, SOC. SEC. BULL., Feb. 1983, at 10.



be used.<sup>52</sup> Thus, the Commission did not recommend a particular fail-safe mechanism, and Congress did not enact one.<sup>53</sup>

Because Social Security does not contain a fail-safe mechanism, it is not entirely clear what would happen if the Social Security trust funds were exhausted.<sup>54</sup> Nevertheless, there appears to be general agreement that Social Security benefits would most likely be reduced, by either timely payment of reduced benefits or delayed payment of full benefits.<sup>55</sup> It appears highly unlikely that full Social Security benefits would continue to be paid in a timely manner, in violation of the Antideficiency Act.<sup>56</sup>

In their 2012 Report, the Social Security Trustees projected that the Social Security trust funds would reach exhaustion in 2033, and at that point in time, Social Security's noninterest income would be sufficient to support payment of 75 percent of Social Security benefits.<sup>57</sup> It further projected that beginning in 2086, Social Security's noninterest income would be sufficient to support 73 percent of scheduled benefits.<sup>58</sup> The Trustees referred to the benefits that Social Security's noninterest income could support as "payable" benefits, while it referred to total benefits to which beneficiaries would be entitled under the Social Security Act as "scheduled but not fully payable" benefits.<sup>59</sup> Apparently relying on the Social Security Trustees' characterization of funded benefits as "payable" benefits, Stephen Goss, chief actuary of the Social Security Administration, declared that "[i]f trust

52. See *id.*

53. Congress did, however, enact a provision requiring that the Board of Trustees submit to Congress a report making recommendations to remedy inadequate balances in the trust funds if the Board determines at any time that the balance ratio of any trust fund may become less than 20 percent for any calendar year. The report must state the extent to which benefits would have to be reduced or the extent to which FICA and self-employment taxes would have to be increased, or set a combination of the two, to ensure a balance ratio of no less than 20 percent. See 42 U.S.C. § 910 (2006).

54. See SCOTT, *supra* note 41, at 6 ("Because the Antideficiency Act would effectively prohibit the government from paying full benefits on time and the Social Security Act entitles beneficiaries and qualifying applicants to scheduled benefits, the conflict between these two laws would need to be resolved by Congress or by the courts."); CONG. BUDGET OFFICE, SOCIAL SECURITY: A PRIMER 43 n.15 (2001), available at <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/32xx/doc3213/entirereport.pdf> ("Because the Social Security Act states that benefits are only payable from the trust funds, it is not clear how revenues would be distributed to beneficiaries after those funds were depleted.").

55. See SCOTT, *supra* note 41, at 6 ("[E]ither full benefit checks would be paid on a delayed schedule or reduced benefits would be paid on time, according to trust fund experts in multiple federal agencies.").

56. Cf. FAY & RODGERS, *supra* note 9, at § II.iii (violations of the Antideficiency Act are relatively rare and generally quite minor and "overall the Act is effective at ensuring expenditures are made appropriately").

57. 2012 ANNUAL REPORT, *supra* note 1, at 11.

58. *Id.*

59. *Id.* at 11 fig.II.D2.



fund assets are exhausted without reform, benefits will necessarily be lowered with no effect on budget deficits.”<sup>60</sup> Goss went on to state that “[i]f the trust funds ever become exhausted, expenditures thereafter would be limited to the amount of continuing tax income.”<sup>61</sup>

In 2003, the U.S. General Accounting Office (GAO)<sup>62</sup> wrote a report applying its criteria for evaluating Social Security reform proposals<sup>63</sup> to a “Trust Fund Exhaustion” scenario.<sup>64</sup> In the report, the GAO assumed that once the trust funds were exhausted, benefit checks would be reduced in proportion to the annual shortfall, in effect providing for an across-the-board reduction in all benefits.<sup>65</sup> The GAO noted, however, that this approach was intended as an analytical tool, not a legal determination.<sup>66</sup> The GAO declared,

The nature and scope of SSA’s administrative challenges under the Trust Fund Exhaustion scenario are difficult to describe or assess given a lack of historical precedent and legislative clarity on how SSA would proceed. At a minimum, a focus on cash management would be needed for SSA to calculate and implement the ongoing benefit adjustments required under the scenario.<sup>67</sup>

In *Social Security: What Would Happen if the Trust Funds Ran Out*, Christine Scott of the Congressional Research Service questioned whether the Social Security officials would have the authority to reduce benefits to which beneficiaries are entitled under the Social Security Act.<sup>68</sup> Accordingly, she suggested that the most likely scenario in the event of trust fund exhaustion is that benefit payments would be delayed rather than explicitly reduced.

Ms. Scott noted that under the Social Security Administration’s current benefit payment schedule, most beneficiaries’ payment dates

60. Goss, *supra* note 45, at 111 (this statement was made in the introduction to the article and does not refer to the trustees’ report).

61. *Id.* at 121. This statement was made after noting that the trustees’ report carefully distinguishes between “scheduled” and “payable” benefits. *Id.* Mr. Goss also mentions the trustees’ projection regarding “payable” benefits. *Id.* at 113.

62. The General Accounting Office is now called the Government Accountability Office.

63. See GEN. ACCOUNTING OFFICE, GAO/T-HEHS-99-94, SOCIAL SECURITY: CRITERIA FOR EVALUATING SOCIAL SECURITY REFORM PROPOSALS (1999).

64. GEN. ACCOUNTING OFFICE, GAO-03-907, SOCIAL SECURITY REFORM: ANALYSIS OF A TRUST FUND EXHAUSTION SCENARIO 1 (2003).

65. *Id.*

66. *Id.* at 14 n.3 (“This definition of a Trust Fund Exhaustion scenario represents an analytic convenience and not a legal determination as to how benefits would fare in the event the combined OASDI Trust Funds were exhausted.”).

67. *Id.* at 6–7.

68. SCOTT, *supra* note 41, at 5 n.22. See also U.S. GEN. ACCOUNTING OFFICE, *supra* note 40, at 3–49 (“Where legislation creates, or authorizes the administrative creation of, binding legal obligations without regard to the availability of appropriations, a funding shortfall may delay actual payment but does not authorize the administering agency to alter or reduce the ‘entitlement.’”).



are based on their day of birth.<sup>69</sup> Thus, benefits are paid on (1) the second Wednesday of the month for beneficiaries born between the first and the tenth of the month, (2) the third Wednesday of the month for beneficiaries born between the eleventh and the twentieth of the month, and (3) the fourth Wednesday of the month for beneficiaries born between the twenty-first and the thirty-first of the month.<sup>70</sup> She contended that so long as the trust funds are adequate, benefit payments could be made in a timely manner following this schedule.<sup>71</sup> If the trust funds' balance reaches zero, benefit payments could stop until additional money is appropriated to the trust funds.<sup>72</sup> Once additional money is appropriated, benefit payments could resume where they stopped until money again runs out.<sup>73</sup> This cycle could continue indefinitely.<sup>74</sup> Scott stated that after trust fund exhaustion, all beneficiaries would receive checks paying benefits in full about nine months of the year, but the timing of the checks would be unpredictable.<sup>75</sup>

Thus, it appears that if the Social Security trust funds were exhausted, Social Security beneficiaries would receive reduced benefits. They would, however, remain legally entitled to receive full scheduled benefits if and when Congress appropriated a sufficient amount of money to the Social Security trust funds. Suppose, however, Congress elected not to appropriate additional funds. Could Congress amend the Social Security Act to reduce benefits retroactively so that beneficiaries never receive the unfunded portion of their scheduled benefits?

## II. Could Congress Amend Social Security to Reduce Retroactively Scheduled but Unpaid Benefits?

The law points in two different directions with respect to the question of whether Congress could amend Social Security to reduce retroactively scheduled but unpaid benefits. On the one hand, as discussed above, the Social Security Act states that individuals who satisfy the statutory requirements are "entitled" to benefits, and since their inception, Social Security benefits have been characterized as an "earned right."<sup>76</sup> On the other hand, Congress has always expressly reserved

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69. SCOTT, *supra* note 41, at 6; see also *Day of the Month Benefits Are Paid*, U.S. Soc. SEC. ADMIN., [http://ssa-custhelp.ssa.gov/app/answers/detail/a\\_id/8](http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/8) (last updated Jan. 24, 2012).

70. SCOTT, *supra* note 41, at 6. Benefits are paid on the third day of the month for most beneficiaries who began to receive benefits before 1997. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. In recommending that Social Security be financed principally through payroll taxes, the Committee on Economic Security, the group charged with drafting the original Social Security program, explained that "[c]ontributory annuities are unquestionably preferable to noncontributory pensions. They come to the workers as a right, whereas



"[t]he right to alter, amend, or repeal any provision" of the Social Security Act.<sup>77</sup>

In *Flemming v. Nestor*,<sup>78</sup> the Supreme Court addressed the question of whether Social Security's nature as an "earned right" makes it a vested property right subject to protection under the Fifth Amendment. In that case, Ephram Nestor,<sup>79</sup> who immigrated to the United States from Bulgaria in 1913, challenged the termination of his Social Security benefits under section 202(n) of the Social Security Act. This section provided for the termination of Social Security benefits for beneficiaries who are deported under, among other sections, section 241(a)(6) of the Immigration and Nationality Act.<sup>80</sup> After having paid FICA taxes from December 1936 through January 1955,<sup>81</sup> Nestor became eligible for Social Security old-age benefits in November 1955.<sup>82</sup> In 1956, he was deported from the United States under section 241(a)(6)(C)(i) of the Immigration and Nationality Act for having been a member of the Communist Party from 1933 to 1939.<sup>83</sup> Shortly after his deportation, his benefits were terminated under section 202(n) of the Social Security Act.<sup>84</sup>

In 1958, a complaint was filed on Nestor's behalf challenging the constitutionality of the termination of his Social Security benefits.<sup>85</sup> The district court held that Nestor's Social Security benefits were "property rights" and that Nestor "was not afforded due process of law in being deprived of his benefits through a legislative enactment which took such benefits because of deportation."<sup>86</sup> In a five-to-four

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the noncontributory pensions [that is, welfare] must be conditioned upon a 'means' test." Soc. Sec. 1934-35 COMM. ON ECON. SEC., REPORT OF THE COMMITTEE ON ECONOMIC SECURITY 22 (1935), available at <http://www.ssa.gov/history/reports/ces5.html>. According to Robert Ball, Social Security commissioner under three different administrations, Social Security benefits' character as an earned right is the second principle of Social Security's nine guiding principles. See ROBERT M. BALL, INSURING THE ESSENTIALS: BOB BALL ON SOCIAL SECURITY: A SELECTION OF ARTICLES AND ESSAYS FROM 1942 THROUGH 2000, at 6 (Thomas N. Bethel ed., 2000); see also JOHN ATTARIAN, THE LUDWIG VON MISES INST., THE ROOTS OF THE SOCIAL SECURITY MYTH 5-6 (2001) (early characterizations of Social Security as an earned or "contractual" right), available at <http://mises.org/pdf/asc/essays/attarian.pdf>.

77. 42 U.S.C. § 1304 (2006).

78. 363 U.S. 603 (1960).

79. See Karen M. Tani, *Flemming v. Nestor: Anticommunism, the Welfare State, and the Making of "New Property,"* 26 LAW & HIST. REV. 379 (2008) (detailed analysis of Ephram Nestor and his case).

80. See 42 U.S.C. § 402(n) (2006).

81. *Nestor*, 363 U.S. at 621.

82. *Id.* at 605.

83. *Id.*

84. *Id.*; see 42 U.S.C. § 402(n) (2006).

85. Tani, *supra* note 79, at 392. The revocation was challenged on four grounds: (1) as a penalty inflicted without a judicial trial; (2) as an ex post facto punishment; (3) as irrational and thus in violation of the Due Process clause; and (4) as a violation of the First Amendment by punishing Nestor for his past membership in the Communist party. *Id.*

86. *Nestor v. Folsom*, 169 F. Supp. 922, 934 (D.D.C. 1959), *rev'd sub nom.* *Flemming v. Nestor*, 363 U.S. 603 (1960).



decision, the Supreme Court reversed the district court and held that the district court erred in holding that section 202(n) of the Social Security Act deprived Nestor of an "accrued property right."<sup>87</sup> Relying in large part on section 1104 of the Social Security Act, which reserves to Congress "[t]he right to alter, amend, or repeal any provision" of the Act, the Court declared that "[t]o engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever changing conditions it demands."<sup>88</sup> The Court held that "a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment."<sup>89</sup>

The Court went on to note that Congress may not amend the Social Security Act entirely free of constitutional restraint.<sup>90</sup> Rather, the Due Process Clause bars legislation that "manifests a patently arbitrary classification, utterly lacking in rational justification."<sup>91</sup> Nevertheless, the Court found two rational justifications for section 202(n)<sup>92</sup> and held that it could not be "condemned as so lacking in rational justification as to offend due process."<sup>93</sup>

In *The New Property*,<sup>94</sup> Charles Reich harshly criticized *Flemming v. Nestor*<sup>95</sup> and argued that government largess should be a protected property right.<sup>96</sup> He offered four guiding principles to consider as the country moves toward a welfare state where largess must "begin to do the work of property."<sup>97</sup> Under the first principle, the government should not have the power to "buy up" rights guaranteed by the Constitution; like the rule prohibiting unconstitutional conditions, the government "should not be able to impose any condition on largess that would be invalid if imposed on something other than a

87. *Nestor*, 363 U.S. at 608.

88. *Id.* at 610-11 (citing 42 U.S.C. § 1304 (2006)).

89. *Id.* at 611.

90. *Id.*

91. *Id.*

92. The Court found that it was not irrational for Congress to consider a beneficiary's residence in determining eligibility for Social Security benefits because nonresident Social Security beneficiaries are unlikely to use their benefits to contribute to the United States' national economy. In addition, the Court found that it could not be "deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute." *Id.* at 612.

93. *Id.*

94. Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

95. *Id.* at 768-71, 775.

96. *Id.* at 785-86 ("The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance . . . Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.")

97. *Id.* at 778.



'gratuity.'"<sup>98</sup> Under the second principle, substantive limits, including limits on relevance and discretion, should be imposed on governmental power over largess. In addition, policy-making authority should not be delegated to organizations that are essentially private.<sup>99</sup> Under the third principle, government largess should be protected by procedural safeguards.<sup>100</sup> Under the fourth and final principle:

Eventually those forms of largess which are closely linked to status must be deemed to be held as of right. . . . If revocation is necessary, not by reason of the fault of the individual holder, but by reason of overriding demands of public policy, perhaps payment of just compensation would be appropriate.<sup>101</sup>

Professor Reich's article was arguably the most influential law review article of the second half of the twentieth century, with at least fifty cases relying on it by the article's twenty-fifth anniversary.<sup>102</sup> Among those fifty cases are *Goldberg v. Kelly*<sup>103</sup> and *Mathews v. Eldridge*.<sup>104</sup> In *Golberg*, the Supreme Court explicitly cited Professor Reich's work and declared, "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"<sup>105</sup> In *Mathews*, the Supreme Court held that the continued receipt of Social Security disability benefits is a "statutorily created 'property' interest protected by the Fifth Amendment."<sup>106</sup>

Citing these cases, commentators have argued that *Flemming v. Nestor* is "outdated case law"<sup>107</sup> that has been "called into question."<sup>108</sup> Indeed, relying in part on *Goldberg v. Kelly*, Matthew Hawes has argued that Social Security benefits are a property interest protected not only by procedural due process, but also by the Takings Clause of the Fifth Amendment.<sup>109</sup>

In *Goldberg* and *Mathews*, among other cases, the Supreme Court embraced Professor Reich's third principle that government largess should be protected by procedural safeguards. In no case, however, has the Court adopted Professor Reich's fourth and final principle that government largess should be protected by the Takings Clause

98. *Id.* at 779–82.

99. *Id.* at 782–83.

100. *Id.* at 783–785.

101. *Id.* at 785.

102. Charles A. Reich, *The New Property After 25 Years*, 24 U.S.F.L. REV. 223, 242–53 (1990).

103. 397 U.S. 254 (1970).

104. 424 U.S. 319 (1976).

105. 397 U.S. at 263 n.8.

106. 424 U.S. at 332.

107. Matthew H. Hawes, *So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits*, 65 U. PITT. L. REV. 898, 907 (2004).

108. Tani, *supra* note 79, at 381 n.8.

109. Hawes, *supra* note 107, at 907–10.



as a vested property right. Rather, in *Richardson v. Belcher*,<sup>110</sup> the Supreme Court reaffirmed *Flemming v. Nestor* and limited *Goldberg* and its progeny to ensuring the procedural due process rights of recipients of government largess.

In *Belcher*, the recipient of Social Security disability benefits, who was also receiving workers' compensation benefits, challenged a monthly offset of his Social Security benefits under section 224 of the Social Security Act. In rejecting the recipient's challenge, the Court reaffirmed its holding in *Flemming v. Nestor* that "a person covered by the [Social Security] Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment."<sup>111</sup> According to the Court, "the analogy drawn in *Goldberg* between social welfare and 'property' cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits."<sup>112</sup> Instead, the Court reaffirmed the *Nestor* rule that the Fifth Amendment only protects Social Security beneficiaries against arbitrary classifications and found that Congress's goals in adopting the offset provision were legitimate and its classification was rationally related to achieving those goals.

One may sincerely believe, and perhaps even persuasively argue, that *Flemming v. Nestor* was wrongly decided and that Social Security benefits should be treated as a vested property right protected under the Takings Clause.<sup>113</sup> Nevertheless, the Supreme Court has repeatedly reaffirmed *Flemming*<sup>114</sup> and limited *Goldberg* to ensuring that government largess is protected by procedural due process.<sup>115</sup> Thus, it appears clear that Congress may retroactively reduce Social Security benefits without violating the Takings Clause.<sup>116</sup>

110. 404 U.S. 78 (1971).

111. *Id.* at 80 (quoting *Flemming v. Nestor*, 363 U.S. 603 (1960)).

112. *Id.* at 81.

113. See Hawes, *supra* note 107; Reich, *supra* note 102; see also Mark Pettit Jr., *Modern Unilateral Contracts*, 63 B.U.L. REV. 551, 571 n.98 (1983). But see Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C.L. REV. 975, 1044-53 (2000) (Social Security should be conceptualized as an earnings-based entitlement rather than a private property interest).

114. See, e.g., *United States v. Fior D'Italia*, 536 U.S. 238, 254 n.2 (2002) (J. Souter, dissenting); *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980).

115. See also Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 958 (2000) ("The proposition that Goldberg-type 'property' exists only for procedural due process has been perceived as so self-evidently correct that it has never been revisited.")

116. Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U.L. REV. 605, 653 (1996) ("The Court has uniformly found that the 'new' property, meaning government entitlements such as welfare, social security, and public education, are not considered property for the purposes of the Takings Clause.")



Under *Flemming* and *Belcher*, however, Congress is not free to reduce Social Security benefits retroactively without limit. Rather, substantive due process prohibits Congress from arbitrarily reducing Social Security benefits.<sup>117</sup> A retroactive across-the-board reduction in scheduled but unfunded Social Security benefits, however, is unlikely to run afoul of such a prohibition.<sup>118</sup> Addressing a funding deficit is certainly a legitimate state purpose, and retroactively reducing benefits across-the-board clearly is rationally related to that purpose. Thus, it appears that Congress could retroactively reduce scheduled but unfunded Social Security benefits.

### III. Conclusion

Unless the Social Security Act is amended, the Social Security Trustees project that by 2033, assets in the Social Security trust funds will only be sufficient to pay 75 percent of scheduled benefits. At that point, the Antideficiency Act would prevent the Treasury Department from issuing checks to pay full benefits, and beneficiaries would, in all likelihood, receive reduced benefits. Beneficiaries, however, would remain legally entitled to their higher scheduled benefits. If, and when, Congress were to appropriate sufficient funds to the Social Security trust funds to cover scheduled but unpaid benefits, beneficiaries would be entitled to the payment of full benefits.

Congress, however, would not be legally required to appropriate sufficient funds to ensure full payment of scheduled benefits. Although individuals who satisfy Social Security's statutory requirements are legally entitled to Social Security benefits, Social Security benefits are not vested property interests protected by the Takings Clause. Congress has the power to alter, amend, or repeal any provision of the Social Security Act and may retroactively reduce benefits so long as any such reduction is not wholly irrational and arbitrary. If Congress were to enact an across-the-board retroactive reduction in Social Security benefits to address Social Security's deficit, such a reduction would likely be held to be rationally related to the legitimate state purpose of addressing the program's funding deficit.

Of course, the Social Security trust funds need never reach the point of exhaustion. Congress can, and should, amend the Social

117. Cf. SWENDIMAN & NICOLA, *supra* note 32, at 4 ("Thus, only if Congress were to act in a totally irrational and arbitrary manner would due process considerations invalidate a subsequent amendment.").

118. See *PBGC v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984) ("[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.").



Security Act to address the program's long-term deficit.<sup>119</sup> Congress could solve the long-term deficit by increasing tax revenues, reducing benefits, or a combination of the two. None of those changes, however, is costless.<sup>120</sup>

The fact that reform is not easy does not relieve Congress of the responsibility to act. Congress can, and should, reform Social Security. And the sooner, the better.<sup>121</sup>

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## I. Introduction

The use of default settings in defined contribution (DC) plans is increasing both in the United States and in Australia. Default settings may relate to participation in plans, choice of contribution level, or choice of investment funds and strategies. A variety of drivers are responsible for the use of default settings in these plans. Behavioral science research indicates that default settings may counteract the effects of inertia and other impediments to optimal decision making.<sup>1</sup> The search on the effect of investment allocation in 401(k) plan accounts on losses during the financial crisis highlighted the danger of investment allocations concentrated in high-risk assets, particularly for participants close to retirement.<sup>2</sup> Concern has long existed about the number of employees who do not participate even when offered 401(k) plans.<sup>3</sup>

Although both countries have increased the use of default settings in DC plans, U.S. and Australian policymakers have taken different approaches to important aspects of default investment in DC plans. Part II of this article begins with a very brief overview of the DC system in the United States and a more detailed discussion of the Australian system. Part III discusses the use of default settings in DC plans.

119. See, e.g., Kathryn L. Moore, *The Future of Social Security: Principles to Guide Reform*, 41 J. MARSHALL L. REV. 1061 (2008) (discussion of the principles that should guide reform).

120. See, e.g., Kathryn L. Moore, *Social Security Reform: Fundamental Restructuring or Incremental Change*, 11 LEWIS & CLARK L. REV. 341 (2007) (analysis of a variety of reform proposals and their distributive impacts); Kathryn L. Moore, *Social Security Reform: An Analysis of the Ball/Altman Three-Point Plan*, in 2007 NEW YORK UNIVERSITY REVIEW OF EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION 22-1 (Alvin D. Laurie, ed., 2007) (evaluating Ball/Altman reform proposal); Kathryn L. Moore, *Raising the Social Security Retirement Ages: Weighing the Costs and Benefits*, 33 ARIZ. ST. L.J. 543-612 (2001) (advantages and disadvantages of proposals to increase Social Security retirement ages).

121. See, e.g., Moore, *supra* note 119, at 1082-84 (discussing advantages of acting to reform Social Security sooner rather than later).